

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

JUSTIN GARDNER,

Petitioner,

vs.

SCOTT R. FRAKES,

Respondent.

**4:21CV3067**

**MEMORANDUM AND ORDER**

This matter is before the court on correspondence from the Petitioner Justin Gardner filed on March 23, 2022. (Filing 28.) Petitioner states he is unable to file a notice of appeal in the present case “due to [circumstances] out of the Petitioner [sic] control by the Nebraska Department of Correctional Services” and asks the court to grant him “some relief due to this situation that is out of the Petitioner [sic] control.” (*Id.*)

The court liberally construes Petitioner’s correspondence as a motion for extension of time to file a notice of appeal. “An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4.” Fed. R. App. P. 3(a)(1). Pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A), the notice of appeal in a civil case must be filed within 30 days of the entry of judgment. A district court may extend the time to file a notice of appeal if a party moves for an extension of time and shows excusable neglect or good cause, provided that the party moves for the extension of time within 30 days of the expiration of the 30-day period set out in Rule 4(a)(1)(A). Fed. R. App. P. 4(a)(5)(A).

Here, the court dismissed Petitioner's habeas petition with prejudice on February 22, 2022 and denied him a certificate of appealability.<sup>1</sup> (Filings 26 & 27.) Petitioner had until March 24, 2022 to file a notice of appeal. Petitioner did not file a notice of appeal by that date but instead filed the present timely motion for an extension on March 23, 2022.<sup>2</sup> Upon consideration and for good cause shown, the court will grant Petitioner's motion. Petitioner has until April 25, 2022, to file<sup>3</sup> a notice of appeal. *See* Fed. R. App. P. 4(a)(5)(C) (no extension under Rule 4(a)(5) may exceed 30 days after prescribed time to file notice of appeal or 14 days after date when order granting motion is entered, whichever is later). Petitioner is advised that, along with his notice of appeal, he must either submit the \$505.00 filing and docket fees to the clerk's office or submit a request to proceed in forma pauperis using the enclosed form.

IT IS THEREFORE ORDERED that:

1. Petitioner's correspondence (filing 28), liberally construed as a motion for extension of time to file an appeal, is granted. Petitioner has until **April 25, 2022** to file his notice of appeal.

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<sup>1</sup> The court notes that Petitioner "cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c)." Fed. R. App. P. 22(b)(1). "If the district judge has denied the certificate, the applicant may request a circuit judge to issue it." *Id.* Rule 22(b)(2) of the Federal Rules of Appellate Procedure further provides that "[i]f no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals." Thus, any notice of appeal filed by Petitioner may also serve as a request to the Eighth Circuit Court of Appeals for a certificate of appealability.

<sup>2</sup> Because Petitioner filed his motion for extension of time prior to the expiration of the time prescribed for filing a notice of appeal in Fed. R. App. P. 4(a)(1), the court may consider the motion despite Petitioner's failure to give notice of his motion to Respondent. Fed. R. App. P. 4(a)(5)(B).

<sup>3</sup> Petitioner is advised that, pursuant to Federal Rule of Appellate Procedure 4(c)(1), a prisoner's notice of appeal is timely filed if deposited in the institution's internal mail system on or before the last day for filing and accompanied by a declaration as to mailing.

2. The clerk of the court is directed to send to Petitioner the Form AO240 (“Application to Proceed Without Prepayment of Fees and Affidavit”).

3. The clerk of the court is directed to set a pro se case management deadline using the following text: **April 25, 2022**: deadline to file notice of appeal.

Dated this 31st day of March, 2022.

BY THE COURT:



Richard G. Kopf  
Senior United States District Judge